UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

MV PUBLIC TRANSPORTATION, INC.		
and	**Case Nos.**	**29-CA-29530** **29-CA-29760**
JOHN D. RUSSELL, AN INDIVIDUAL		
and	**Case No.**	**29-CA-29544**
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO		
and	**Case No.**	**29-CA-29619**
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Party to the Contract		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and	**Case No.**	**29-CB-13981**
JOHN D. RUSSELL, AN INDIVIDUAL		

RESPONDENT'S MOTION TO DISMISS PARTIALLY DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

LITTLER MENDELSON
A Professional Corporation
H. TOR CHRISTENSEN
1150 17th Street, NW
Suite 900
Washington, D.C. 20036
(202) 842-3400

Attorneys for Respondent
MV PUBLIC TRANSPORTATION, INC.

Dated: October 15, 2009

COMES NOW RESPONDENT MV PUBLIC TRANSPORTATION, INC. by and through its attorneys undersigned and, pursuant to the National Labor Relations Board's Rules and Regulations, specifically Rule 102.24, moves to partially dismiss the Complaint issued in Case Nos. 29-CA-29530 and 29-CA-29544, or in the alternative, moves for partial summary judgment with respect to the claims of unlawful recognition.

The Complaint in this matter (copy attached as Exhibit A) alleges, among other things, that Respondent unlawfully recognized the International Brotherhood of Teamsters, Local 707 (the "Union"), as the collective bargaining representative of its employees based upon two charges filed more than six months after the date of the recognition of the Union. The Regional Director dismissed identical charges regarding the recognition of the Union, filed by the Amalgamated Transit Union, Local 1181 (the "ATU") as time barred under Section 10(b) of the National Labor Relations Act. The charges filed by John D. Russell, a current employee of Respondent, should be dismissed as similarly time barred under Section 10(b) of the Act.

Respondent now seeks partial dismissal of the Complaint and/or partial summary judgment on the claims of alleged unlawful recognition of the Union, because the recognition alleged to be unlawful occurred more than six months prior to the filing of the charge and is, therefore, time barred under the Act.

I. STATEMENT OF FACTS

A. MV Public Transportation, Inc.

MV Public Transportation, Inc. ("Respondent"), under contract with the New York City Metropolitan Transportation Authority, provides paratransit services to a monthly average of 26,000 passengers in the borough of Staten Island. These paratransit services allow Respondent's passengers to attend medical appointments, maintain employment and participate in recreational activities.

B. The Lawful Recognition of the Union.

Respondent entered into a voluntary recognition agreement with the Union on August 28, 2008 (copy attached as Exhibit B). In brief, the Agreement provided that Respondent would recognize the Union upon a showing that a majority of employees had signed authorization cards or a petition. The agreement further provided that a labor arbitrator or commissioner from the Federal Mediation and Conciliation Service was required to certify the showing of interest. Respondent further agreed to maintain a neutral position as to whether employees were to be represented by the Union and, in exchange, the Union agreed not to engage in negative public campaigning against Respondent as part of its organizational activities.

On September 11, 2008, Arbitrator Elliot D. Shriftman, Esq. certified that the union possessed 20 valid authorization cards from current employees of Respondent, out of 22 total employees. Arbitrator Shriftman executed a Certification of Results of Card Check and Count on that day (copy attached as Exhibit C).

On September 12, 2008, Respondent and the Union executed a Recognition Agreement ("Agreement") (copy attached as Exhibit D). After that point, the Union met with the represented employees, and the parties engaged in negotiations for a first contract. The required '*Dana* Notices' were sent to Respondent on October 2, 2008, and were posted on October 5, 2008, and remained up for the required period of time. The employees ratified a collective bargaining agreement on December 11, 2008, which the Union and Respondent signed on December 12, 2008 (copy attached as Exhibit D).

C. John D. Russell's Charge

John D. Russell ("Charging Party") presently works for Respondent as a Driver. Respondent hired him on October 20, 2008. He filed the instant charges on March 31, 2009 (copies attached as Exhibit E). The ATU filed similar charges on April 9, 2009, alleging, among other things, that Respondent unlawfully recognized the Union (copy attached as Exhibit F). On July 24, 2009, the Regional Director dismissed charges related to the recognition of IBT Local 707 (copy attached as Exhibit G). Upon information and belief, Respondent understands that the

Regional Director dismissed the charge because it was filed outside the six-month statute of limitations under Section 10(b), which ended on March 12, 2009. Upon further information and belief, Respondent understands that the Regional Director is refusing to dismiss the Charging Party's charge because the Regional Director has taken the position that the 10(b) statute of limitations period did not commence until Respondent hired the Charging Party.

II. ARGUMENT

A. The Unlawful Recognition Charges Should Be Dismissed.

1. Respondent Denies It Unlawfully Recognized the Union.

As an initial matter, Respondent denies that it violated the Act in any respect when it recognized the Union as bargaining representative for its employees. Respondent and the Union entered into a lawful Voluntary Recognition Agreement, with significant consideration on both sides. Both parties complied with the terms of the Voluntary Recognition Agreement, as well as with the terms of Operations-Management Memorandum 08-07, which sets the procedure for the voluntary recognition of a union in accordance with the *Dana/Metaldyne* decisions.

In point of fact, there simply can be no argument that anyone who was paying any attention whatsoever to Respondent's operations on Staten Island was not aware of the recognition of the Union. Public notice of Respondent's recognition of the Union was and is provided through the Board's offices, which maintain publicly accessible lists of voluntary recognitions, and on the Board's website, which contains a publicly accessible list of every single voluntary recognition petition ever filed.[1] Further, Respondent understands that the Board's investigation revealed that there was widespread awareness among the employees as to the card check recognition of the Union, including the posting of the card check certification.

As Respondent acted in compliance with a lawful card check Recognition Agreement, the Certification of Arbitrator Elliot Shriftman, and the terms of the Collective Bargaining

[1] This spreadsheet is located at: http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Dana.xls. The voluntary recognition at issue can be found in row number 401.

Agreement between Respondent and the Union, the only reasonable conclusion is that Respondent's voluntary recognition of the Union was lawful.

2. The Russell's Charge is Time Barred Under Section 10(b) of the Act.

The Charging Party filed his charge on March 31, 2009. Respondent recognized the Union on September 12, 2008, over six months prior to the filing of the charge. In fact, barring a claim of fraudulent concealment of the recognition, the Charging Party's time to file a charge expired on March 12, 2009. There has been no allegation or claim that either Respondent or the Union fraudulently or otherwise concealed Respondent's recognition of the Union.

Nor can there be a claim that a continuing violation exists. Indeed, in unlawful recognition cases, "the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed, and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis." *Local Lodge No. 1424 v. N.L.R.B. (Bryan Mfg.),* 362 U.S. 411, 423 (1960).

In this case, while the Charging Party claims that the initial recognition, the requirement that employees join the Union, and the collection of dues were unlawful, these subsequent activities are entirely legal, but for the alleged unlawful recognition. Therefore, where an unfair labor practice charge would not have come about except for some earlier event, that earlier event must be within the Act's statute of limitations. *N.L.R.B. v. Auto Warehousers Inc.,* 571 F.2d 860, 863 (5th Cir. 1978) (dismissing unfair labor practice charges in accordance with Section 10(b) of the Act).

In fact, upon information and belief, the Region dismissed an identical unlawful recognition charge filed by the ATU on the grounds that the charge was time barred. The Charging Party's charge is similarly outside the Act's statute of limitations, and the mere fact the Charging Party's date of hire was several weeks after his employer recognized the Union should not serve to reset the statute of limitations for him, for conduct alleged to have occurred prior to

the date of his hire.

There is no rationale under Section 10(b) which provides that new employees are given a new six month statute of limitations when they are hired. The Act is clear that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." As an initial matter, this would eliminate the very purpose of Section 10(b) of the Act. As the Supreme Court stated in *Bryan Manufacturing*:

> It may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in industrial peace which it is the overall purpose of the Act to secure.

Id. at 429 (*citing N.L.R.B. v. Childs Co.*, 195 F.2d 617, 621-622 (2nd Cir. 1952) (concurring opinion of L. Hand, J.)).

To accept the Regional Director's position would result in new employees being able to challenge the initial recognition of the union at the time of hire, even where the recognition occurred decades earlier. Unfair labor practice charges could be filed at any time, so long as they are filed no more than six months from the time of hiring. The argument that a new employee could not have known of the alleged unfair labor practice or unlawful recognition is true in every case where the union and the employer do not publicly share their collective bargaining agreement. For there to be any industrial stability or labor peace, and for Section 10(b) of the Act to have any meaning, employees must be treated as a class, where notice to one, is notice to all.

In fact, the Board has treated employees in these situations as a class. While a party's time to file a charge does not begin until the charging party has notice, an employee's statute of limitations begins to run when "at least one statutory employee was hired or otherwise had notice of the employer's illegal actions." *N.L.R.B. v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000) (emphasis added) (*citing Texas World Serv. Co. v. NLRB,* 928 F.2d 1426, 1437 (5th Cir. 1991) (holding that the 10(b) period began when "charges first could have been brought"

based upon when the employer first hired employees) and *R.J.E. Leasing Corp.*, 262 NLRB 373, 381-2 (1982) (holding that the 10(b) notice period started when 'employees' became aware of the illegal acts)). No case could be located where a separate statute of limitations was provided to employees hired more than six-months after the date of the recognition, tolling the statute of limitations solely on the basis of when the charging employee was hired by the employer. The time to file a charge begins to run when any employee has notice of their claim, and not when each individual employee learns of a possible claim.

In addition, as described above, there exist a number of methods by which the Charging Party could have learned of the recognition had he availed himself of the local NLRB office or the Board's website. He could have requested a list of voluntary recognitions from any NLRB office, where they are available for the public to review. Moreover, notice of Respondent's recognition of the Union was available on the Board's website, as described above. There is no question that the Charging Party knew or should have known that Respondent voluntarily recognized the Union. His Charge is time barred under Section 10(b) and should be dismissed.

3. *Dedicated Services* is Distinguishable on the Law and on the Facts.

The General Counsel has previously claimed that *Dedicated Services*, 352 NLRB No. 93 (2008)[2] supports the position that the Charging Party's claims are not time-barred. While this might have been true for the ATU's charge, now dismissed, it does not have similar application to the Charging Party's charge. *Dedicated Services* correctly states, "no complaint shall be issued based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." The ALJ then found an exception to this general rule where the employees had notice of the recognition, but that knowledge could not be imputed to the intervening union. Because the intervening union filed the charges in *Dedicated Services*, the ALJ concluded that the union did not have notice of the recognition and, therefore, its charges challenging the recognition were not time barred.

[2] This is a decision upheld by a two-member Board, the status of which is currently on review before the U.S. Supreme Court.

However, this case is distinguishable on several grounds. First, in the instant case, the charge at issue was filed by an employee (as opposed to a union), and it is undeniable that other employees had notice of the recognition of the Union. Whether the ATU had notice, or notice could be imputed to them, may be inferred from the fact that the Region dismissed the ATU's unlawful recognition charge, and is irrelevant to the issue of whether the Charging Party had notice. Second, the reasoning in the cases on which the ALJ relied in support of the exception articulated in *Dedicated Services* all involved situations where the charging union was already the representative of the employees, and the union was alleging unilateral changes to the terms and conditions of employment. In other words, the union at issue was not a stranger to the workplace, and the unilateral changes involved employees already represented by the union.

In the instant case, the ATU does not currently represent any employees of Respondent on Staten Island. Further, the significance of notice is entirely different in a case where the company has allegedly made unilateral changes to the terms and conditions of employment. Where the union has not been put on notice of these unilateral changes, it can not be said to have waived its right to grieve or file charges over those changes. This type of waiver issue is irrelevant with respect to notice to newly hired employees. Finally, the recognition date at issue in *Dedicated Services* was prior to the date the company had "trained or even paid" any employees. Under these facts, the ALJ held that the date by which regular business operations had begun was within the 10(b) period. By contrast, 22 bargaining unit employees had been hired by Respondent at the time of the card check certification, 20 of whom signed signed cards authorizing the Union to be their collective bargaining representative.[3]

III. CONCLUSION

The information submitted in this motion and the attached exhibits establish that the Charging Party's charges are time barred. Accordingly, Respondent respectfully requests that

[3] The General Counsel has, in the past, raised issues of whether there was a representative complement of employees at the time of recognition. Although Respondent believes it can establish that, based on the circumstances at the time of recognition there was a representative complement of employees, this only becomes an issue if the unlawful recognition charge is not dismissed under Section 10(b) of the Act, and will therefore not be addressed in this Motion.

the Board issue an Order dismissing the Complaint in Case Nos. 29-CA-29530 and 29-29544 or, in the alternative, grant summary judgment for the Respondent as to these charges.

Dated: October 15, 2009October 20, 2009

LITTLER MENDELSON
A Professional Corporation

By: _____
H. TOR CHRISTENSEN
Attorneys for Respondent
MV PUBLIC TRANSPORTATION, INC.

AMENDED CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2009, a copy of the foregoing Motion To Dismiss Partially Dismiss The Complaint Or, In The Alternative, Motion For Partial Summary Judgment was served by first-class U.S. mail, postage prepaid, upon:

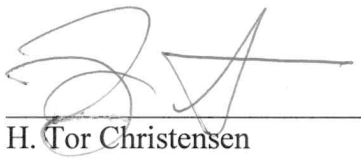
George Kirschenbaum, Esq.
Cary Kane, LLP
1350 Broadway, Suite 815
New York, NY 10018
Counsel for IBT Local 707

Richard Brook, Esq.
Meyer, Suozzi, English & Klein, P.C.
1350 Broadway
New York, NY 10018
Counsel for ATU Local 1181

John D. Russell
667 Quincy Avenue
Staten Island, NY 10305

Eric Baumwoll
63 Ebony Street
Staten Island, NY 10306

Alvin P. Blyer
Regional Director
National Labor Relations Board – Region 29
Two Metro Tech Center
100 Myrtle Avenue, 5th Floor
Brooklyn, NY 11201-4201



H. Tor Christensen